No. 90-51

FILED
JUL 16 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

AETNA LIFE INSURANCE COMPANY, a Connecticut corporation, doing business in Florida, and SOUTHERN BELL TELEPHONE & TELEGRAPH COMPANY,

Petitioners,

v.

KENNETH KANE. individually and as Guardian, next friend and on behalf of JONATHAN ANDREW KANE, a minor,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

SUPPLEMENTAL BRIEF TO PETITIONERS' PETITION FOR WRIT OF CERTIORARI

JOHN R. HARGROVE *
HEINRICH GORDON BATCHELDER
HARGROVE WEIHE & GENT
Broward Financial Centre
Suite 1000
500 East Broward Boulevard
Fort Lauderdale, Florida 33394-3092
(305) 527-2800

* Counsel of Record

Attorneys for Petitioners

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

BEST AVAILABLE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-51

AETNA LIFE INSURANCE COMPANY, a Connecticut corporation, doing business in Florida, and SOUTHERN BELL TELEPHONE & TELEGRAPH COMPANY,[1]

Petitioners,

v.

KENNETH KANE. individually and as Guardian, next friend and on behalf of JONATHAN ANDREW KANE, a minor,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

SUPPLEMENTAL BRIEF TO PETITIONERS' PETITION FOR WRIT OF CERTIORARI

---

[1] The parent corporation of Southern Bell Telephone and Telegraph Company is Bellsouth Corporation. Its sole subsidiary is Bellsouth Services, Inc. The parent corporation of Aetna Life Insurance is Aetna Life and Casualty Company. Aetna's subsidiaries are American Health Capital HIBI Management, American Health Capital Insurance Company, Ltd., Dayton Arcade Community Redevelopment Corporation, Med Southwest, Inc., and VHA Enterprises, Inc.

Pursuant to Rule 15.7 of the Rules of the Supreme Court of the United States, petitioners, Aetna Life Insurance Company and Southern Bell Telephone & Telegraph Company, file this supplemental brief to petition for writ of certiorari to bring to the Court's attention a new case which was not available at the time of the last filing.

The recent decision of the Seventh Circuit Court of Appeals in *Black v. TIC Investment Corp.*, 900 F.2d 112 (7th Cir. 1990), analyzes the different approaches taken by the several circuits in disposing of ERISA claims predicated on estoppel theories. The facts and result in *Black* demonstrate why this Court should accept certiorari to clarify this issue and establish a uniform rule of law.

Black was employed by White Farm Equipment Company ("White") from 1964 until 1981. In 1980, White filed a petition for bankruptcy under Chapter 11. White was sold to TIC in December 1980. Black was then terminated on April 24, 1981. The termination notice stated that he was eligible for severance pay benefits, which were subject to approval under Chapter 11, and that he would receive the benefits when the bankruptcy court approved the payment. White officials told Black that he could file a claim in the bankruptcy court for severance benefits, or the company would give him two months' salary continuation without the need to file a claim. Black chose to file a claim in bankruptcy court. White objected to the claim and the bankruptcy judge dismissed Black's claim for severance pay.

Black filed an action in district court seeking a judicial declaration that defendants were fiduciaries under an ERISA plan, that they had breached their fiduciary duty by objecting to this bankruptcy claim, and that they were estopped to deny the validity of his severance pay claim. The district court held that the severance pay plan was an ERISA welfare benefit plan, and that Black could

not assert an estoppel cause of action. *Id.* at 114. The Seventh Circuit disagreed, holding that "estoppel principles are applicable to claims for benefits under unfunded single-employer welfare benefit plans under ERISA." *Id.* at 115. The reasoning underpinning the court's decision in *Black* is seriously flawed.

First, the court found that the ERISA statutes are silent on the issuse of whether estoppel is applicable to ERISA actions. It thus concluded that whether ERISA could be asserted is "a question of public policy." *Id.* at 114. The court was wrong. As stated by this Court in *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 95 L.Ed.2d 39 (1987), Congress clearly expressed an intent that the civil enforcement provisions of ERISA are the exclusive vehicle for actions by ERISA plan participants and beneficiaries. *Id.* at 50-51. Congress clearly delineated that the types of actions a plan participant can bring are limited to accrued benefits due, a declaratory judgment on entitlement to benefits, an injunction against a plan administrator's improper refusal to pay benefits, or a cause of action for breach of fiduciary duty. 95 L.Ed.2d at 51-52. The civil enforcement provisions found in section 502(a) reveal that Congress did not intend to authorize other remedies. *Id.* The Seventh Circuit's resort to "public policy" directly conflicts with this Court's pronouncement on the subject.[2]

---

[2] While petitioners are cognizant of *Pilot Life's* statement that federal courts are expected to develop a "federal common law of rights and obligations under ERISA-regulated plans," 481 U.S. at 56, 95 L.Ed.2d at 53, the decision makes it clear that all suits under ERISA-regulated plans are to be treated as federal questions governed by § 502(a) (29 U.S.C.S. § 1132(a)). *Pilot Life* cannot be construed as creating a cause of action for estoppel for three reasons. First, nothing within § 502(a) suggests that a cause of action for estoppel was contemplated by Congress. Second, if claimants were able to establish a right to benefits based on estoppel, that right would be predicated on the state law of the district in which the federal court sits. By this method, a back door would be opened

Next, the Seventh Circuit decided that estoppel could be applied because the plan involved was a welfare plan, as opposed to a pension plan,[3] and because White had a single-employer plan rather than a multi-employer plan with multiple fiduciaries controlling a common fund. In other words, the decision in *Black* carves out a narrow exception to the rule prohibiting estoppel depending on the character of the plan and the employer. This is clearly contrary to the Congressional intent behind ERISA.

ERISA statutes uniformly govern all types of ERISA plans without regard to whether the plan is a welfare or pension plan, and without regard to whether it is a single or multi-fiduciary plan. *The same statutes govern all ERISA plans.* The decision in *Black* disregards the comprehensive nature of the legislation and instead of deferring to Congress, the court has now created legislation of its own.

By distinguishing between different types of plans and administrators, the court in *Black* has opened a Pandora's box which will allow estoppel in varying situations depending on the type of plan. Under the Seventh Circuit's reasoning, a participant will be able to establish an estoppel theory provided that he is fortunate enough to belong to a self-funded single employer welfare plan. This result is directly contrary to the need for uniformity of plan administration and to Congress' stated preference that benefits be paid pursuant to the terms of a written plan.

---

for state law to dictate the results in this federally preempted area. Third, rather than adhering to the policy favoring uniformity of administration of written ERISA plans, application of estoppel would result in the same plan varying not only from participant to participant, but from state to state.

[3] The court in *Black* distinguished between pension plans and welfare plans on the basis of "actuarial soundness." It noted that pension plans are funded and have strict vesting and accrual requirements whereas welfare plans do not. 900 F.2d at 115.

The Seventh Circuit decision creates clear conflict with decisions in the Fourth, Tenth and Eleventh Circuits, and the court in *Black* recognized the conflict. The decision also conflicts with the position of the Fifth Circuit. It is now time for this Court to put an end to the disparate results among circuits and the different tests that are being applied to justify or disallow causes of action for estoppel.[4] *Black* illustrates perfectly that each circuit is taking a different approach and reaching contrary conclusions in the absence of definitive guidance from this Court.

CONCLUSION

Allowing estoppel claims based on oral representations circumvents the ERISA requirement of written documents which assure the stability and consistency of ERISA plans. Petitioners urge this Court to grant the petition for writ of certiorari in order to address this timely issue on a uniform basis.

Respectfully submitted,

JOHN R. HARGROVE *
HEINRICH GORDON BATCHELDER
HARGROVE WEIHE & GENT
Broward Financial Centre
Suite 1000
500 East Broward Boulevard
Fort Lauderdale, Florida 33394-3092
(305) 527-2800

* Counsel of Record

Attorneys for Petitioners

[4] The state of confusion in the district and circuit courts is well illustrated in *Porter v. Mutual Serv. Life Ins.*, No. CV90-PT-700-S (N.D. Ala. June 26, 1990) (order denying motion to dismiss and granting motion to strike claim for punitive damages). The court in *Porter* was unable to reconcile several decisions issued by the 11th Circuit dealing with the estoppel issue in ERISA cases. Out of sheer frustration the court stated facetiously that "[o]ne of our judges has stated that 'This is the most screwed up area of the law that I have encountered in 17 years on the bench.' This court is not prescient enough to fully decide how the law will further develop." *Id.* at 4, n.7.